

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 20, 2006

STATE OF TENNESSEE v. CHRISTOPHER WAYNE HOLDEN

Appeal from the Circuit Court for Marshall County
Nos. 136474 and 16859 Robert Crigler, Judge

No. M2006-01447-CCA-R3-CD - Filed January 30, 2007

The Defendant, Christopher Wayne Holden, entered an open guilty plea in the Marshall County Circuit Court to one count of burglary of an automobile, two counts of theft under \$500, two counts of criminal trespass, and one count of illegal possession or fraudulent use of a credit or debit card. For the Class E felony burglary conviction, the Defendant was sentenced to six years as a career offender. The trial judge ordered the Defendant's sentences for the misdemeanor convictions in this case to run concurrently with the felony sentence for an effective six-year sentence in the Department of Correction. The trial judge further ordered that the sentence in this case be served consecutively to his prior sentences in Coffee County and Bedford County. The Defendant now appeals the trial court's decision to impose consecutive sentences, arguing that his criminal activity in all three counties was part of a common scheme or plan and should not merit consecutive sentences. The State argues that the trial court properly sentenced the Defendant to consecutive sentences based upon his professional criminal status and his extensive criminal record. We conclude that the trial court did not err or abuse its discretion by ordering the Defendant to serve his Marshall County sentence consecutively to his Coffee County and Bedford County sentences. The judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Andrew Jackson Dearing, Shelbyville, Tennessee, for the appellant, Christopher Wayne Holden.

Michael E. Moore, Acting Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; Mike McCown, District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Background

The Defendant entered an open guilty plea before the Marshall County Circuit Court to one count of burglary of an automobile, two counts of theft under \$500, two counts of criminal trespass, and one count of illegal possession or fraudulent use of a credit or debit card. The factual basis for the guilty plea was summarized at the plea hearing as follows:

On May the 6th of 2005, at approximately 12:45 p.m., Deputy Moorehead, who is the SRO at the Marshall County High School, was checking the parking lot at that facility, which is located in Marshall County, Tennessee, for suspicious activity. Upon pulling to the rear of the parking lot, he observed a black Mercury Cougar sitting in the parking lot with a female in the driver's seat. He drove around a row of cars to get to the vehicle. He observed a white male, which is going to be the Defendant, near some student's vehicles.

When the white male spotted the patrol car, he began to walk at a fast pace toward the Cougar. The officer activated his blue lights and advised the Defendant to stop. . . .

. . . .

The vehicle that these subjects were in . . . matched the description of a vehicle that had been on the premises on April the 13th of 2006, that was a vehicle that was there the day that the burglary of a vehicle belonging to [a cafeteria worker] occurred. . . .

Also, [the Defendant] matched the description of a videotape that had been taken into custody at the Wal-Mart in Columbia where he was trying to use the credit card that was taken out of [the cafeteria worker's] purse during that automobile burglary on April the 13th.

Both individuals at that time were placed under arrest for criminal trespassing that occurred that day on May the 6th of 2005. . . .

[The Defendant] was read his rights. And he eventually confessed to coming onto the Marshall County High School parking lot on April the 13th of 2005, where he made unlawful entrance into [the cafeteria worker's] vehicle that was parked on that lot, and that

he took her purse containing credit cards and other valuables valued at less than \$500.

[The Defendant] then stated that [the female], on that particular date, after the 13th, drove to the Run Market . . . in Marshall County, Tennessee, where he used the credit card to purchase \$30 worth of gasoline to put into [the female's] vehicle. He then stated that he drove—or they drove from that market to Columbia to the Wal-Mart where he admitted . . . [that he] used the credit card

Subsequent to the acceptance of the guilty plea, the trial court held a sentencing hearing. The Defendant conceded that he qualified as a career offender for purposes of his Marshall County sentences. However, the State and the Defendant disagreed over whether the Marshall County sentence should run consecutively to or concurrently with his sentences in Bedford and Coffee counties. The State argued that the Defendant was both a professional criminal and an offender with an extensive criminal record and thus merited consecutive sentences. See Tenn. Code Ann. §40-35-115(b)(1)-(2). In response, the Defendant asserted that his prior sentences should run concurrently to this sentence because “these were all . . . alleged out of the same scheme and common design, even though there is some time in between.”¹

Following the sentencing hearing, the trial judge sentenced the Defendant as a career offender to serve six years in the Department of Correction for his burglary of an automobile conviction. The judge ordered that the Defendant's remaining misdemeanor offenses in Marshall County be served concurrently for an effective sentence of six years in the Department of Correction. The trial judge further ordered that the Defendant's Marshall County felony sentence should run consecutively to his twenty-year sentence in Bedford County and his eight-year sentence in Coffee County. The trial court reasoned as follows:

For the record, [the burglary charge] is a Class E felony. Carries [one to six years]. The Court finds that there are six prior felonies. There is but one sentence that can be imposed. That is a six-year sentence as a career offender at [sixty] percent.

. . . .

¹ The record from the sentencing hearing shows that the offenses in the case sub judice were committed in April and May of 2006. The offenses in the Coffee County case were committed in March of 2004. The Defendant's offenses in Bedford County apparently occurred in 1989, 1991, 1994, and 1999. The Defendant did not present any further proof or explanation of how these cases were part of the “same common scheme or design.”

[I] agree with the State's argument under 40-35-115 that the [D]efendant is an offender whose record of criminal activity is extensive. And also that the professional criminal factor above that, I also find that for either reason alone or together.

I find that [the burglary charge] should be consecutive to Bedford and Coffee County. . . .

[The other charges in this case] will run concurrent with [the burglary charge], however. Given that they are rising out of the same incident.

This appeal followed.

Analysis

The Defendant's sole issue on appeal is whether the trial court erred in ordering his sentence in Marshall County to run consecutively to his previous sentences in Coffee and Bedford counties.² Before a trial court imposes a sentence upon a convicted criminal defendant, it must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; and (f) any statement the defendant wishes to make in the defendant's own behalf about sentencing. See Tenn. Code Ann. § 40-35-210(b); State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002). To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. See State v. Samuels, 44 S.W.3d 489, 492 (Tenn. 2001).

Upon a challenge to the sentence imposed, this court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. See Tenn. Code Ann. § 40-35-401(d). However, this presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts

²We note that the legislature has recently amended several provisions of the Criminal Sentencing Reform Act of 1989, said changes becoming effective June 7, 2005. However, the Defendant's crime in this case occurred prior to June 7, 2005, and the Defendant did not elect to be sentenced under the provisions of the Act by executing a waiver of his ex post facto protections. See 2005 Tenn. Pub. Acts ch. 353 § 18. Therefore, this case is not affected by the 2005 amendments, and the statutes cited in this opinion are those that were in effect at the time the instant crimes were committed.

and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court’s findings of fact are adequately supported by the record, then the presumption is applicable, and we may not modify the sentence even if we would have preferred a different result. See State v. Fletcher, 805 S.W. 2d 785, 789 (Tenn. Crim. App. 1991). We will uphold the sentence imposed by the trial court if (1) the sentence complies with the purposes and principles of the 1989 Sentencing Act and (2) the trial court’s findings are adequately supported by the record. See State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). The burden of showing that a sentence is improper is upon the appealing party. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments; Arnett, 49 S.W.3d at 257.

“Whether sentences are to be served concurrently or consecutively is a matter addressed to the sound discretion of the trial court.” State v. James, 688 S.W.2d 463, 465 (1984). Under Tennessee Code Annotated section 40-35-115, the trial court “may order sentences to run consecutively if the court finds by a preponderance of the evidence that. . . . ‘[t]he defendant is a professional criminal who has knowingly devoted such defendant’s life to criminal acts as a major source of livelihood’ [or] ‘[t]he defendant is an offender whose record of criminal activity is extensive’” Tenn. Code Ann. § 40-35-115(b)(1)-(2). Consecutive sentencing must also follow the general sentencing principles, requiring that the overall sentence “should be no greater than that deserved for the offense committed” and “should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. . . .” Tenn. Code Ann. § 40-35-103.

In this case, the trial court found that the Defendant was eligible for consecutive sentences based upon both the professional criminal provision and the extensive criminal record provision. See Tenn. Code Ann. § 40-35-115(b)(1)-(2). Each finding is supported by the fact that the Defendant has sufficient felony convictions to be deemed a career offender for sentencing purposes and a lengthy misdemeanor record. See Tenn. Code Ann. § 40-35-108(a)(3). At the sentencing hearing, the Defendant did not specifically challenge that his criminal record qualified him for these classifications; moreover, he makes no such argument on appeal.

Instead, the crux of the Defendant’s argument is that his aggregate sentence³ is excessive. We conclude that the effective sentence is neither unduly severe nor undeserved given the Defendant’s extensive record of criminal activity. The Defendant has at least seven prior felony convictions and numerous misdemeanor convictions spanning from 1988 to 2005. The Defendant’s convictions include arson, assault and battery, two aggravated burglaries, escape, attempted escape, eleven automobile burglaries, eight thefts, criminal trespass, forgery, vandalism, acting as an accessory after the fact, writing worthless checks, fraudulent use of credit cards, three violations of

³It is unclear whether the Defendant’s aggregate sentence is thirty-four years or twenty-six years because the record is not clear whether the Bedford and Coffee County sentences were already ordered to be served consecutively or concurrently. However, we do not believe that the eight-year difference is significant because the trial court acted within its discretion to add this effective six-year sentence to the Defendant’s prior sentences.

the driver's license laws, three traffic offenses, and a violation of an order of protection. The Defendant has previously violated conditions of both probation and parole. The Defendant's formal education ended at the tenth grade. He received his GED while incarcerated at Riverbend Maximum Security Institution in 1992. Although the trial judge did not specifically find that the Defendant's potential for rehabilitation is low, we conclude that the trial court's imposition of consecutive sentences was obviously based upon the Defendant's continuous and ongoing criminal activity. The record clearly supports this finding and the inference that the Defendant is a poor candidate for rehabilitative efforts. Not counting traffic offenses, it appears that the Defendant has approximately thirty-two prior convictions. The trial court also did not discuss the Defendant's reliance on criminal activity as a major source of livelihood, but again, the pre-sentence report demonstrates that the Defendant relied upon his criminal acts for financial support. The pre-sentence report reflects an employment history that is "sporadic at best." Therefore, we conclude that the trial court acted within its discretion to find that the Defendant should serve his Marshall County sentence consecutively to his Bedford and Coffee County sentences.

While the Defendant asserts that his previous and present offenses were "part of a larger continuing plan[.]" we conclude that this argument has no merit. Under Tennessee Code Annotated section 40-35-115, no provision is made in the consecutive sentencing law to exclude offenses of a "continuing plan." See Tenn. Code Ann. § 40-35-115. The Defendant does not draw this Court's attention to any sentencing principle that would require a trial judge to impose concurrent sentences if such a "continuing plan" were proven. Furthermore, the Defendant has not posited any factual evidence that would show a connection between the Defendant's present and past criminal offenses. As the Defendant's brief points out, "simply because [an individual] may have committed a series of crimes 'does not mean that they are part of a common scheme or plan.'" State v. Denton, 149 S.W.3d 1, 14 (Tenn. 2004) (quoting State v. Peacock, 638 S.W.3d 837, 840 (Tenn. Crim. App. 1982)). Thus, we conclude that the trial court did not err in determining that the Defendant was eligible for consecutive sentences based upon both his extensive criminal record and his professional criminal status.

Conclusion

Based upon the foregoing authorities and reasoning, we affirm the judgment of the trial court.

DAVID H. WELLES, JUDGE